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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2184**

State of Minnesota,
Respondent,

vs.

Ross Bernard Hart,
Appellant.

**Filed January 15, 2008
Affirmed
Crippen, Judge***

St. Louis County District Court
File No. DU-CR-06-3247

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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John M. Stuart, State Public Defender, Sara L. Martin, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Crippen, Judge; and Muehlberg, Judge.**

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

** Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CRIPPEN, Judge

Following a mistrial after a juror became sick, appellant Ross Bernard Hart was convicted by a second jury of financial transaction card fraud. On appeal, he challenges the sufficiency of the evidence to support his conviction and the district court's decisions (1) sentencing him to a felony-level offense when there was no stipulation to a prior offense at the second trial, and (2) admitting impeachment evidence of two prior convictions.

We affirm appellant's conviction and sentence. Because the jury was entitled to accept evidence contradicting appellant's testimony, the evidence was sufficient to support the jury's verdict. Any other alleged errors, if they occurred, were harmless.

FACTS

On May 24, 2006, R.K. realized that his credit card was missing and filed a report with police. Appellant thereafter was charged on evidence that he used the card.

At trial, R.K. testified that sometime during the evening of May 22, 2006, he used his credit card at a casino in Duluth. While at a nearby bar later that evening, R.K. met appellant, whom he had never met before. R.K. further testified that he did not owe appellant any money, that he did not give appellant his credit card, and that he did not give appellant permission to use his credit card.

Appellant testified that R.K. owed him \$80 due to an incident when the two met several days prior to May 22 and that when they met on May 22, R.K. still had no money and offered to give appellant his credit card. Appellant admitted that he subsequently

made a \$31 purchase on the card, following several previous, unsuccessful attempts to use it, and that he got rid of the card when he failed to find R.K. to return it. Two of appellant's admitted attempts to use the card were for amounts in excess of the "\$30 to \$40" card-balance amount that appellant says was disclosed by R.K.

Prior to the first trial, defense counsel announced that appellant would stipulate to a prior theft conviction, which was the element that enhanced the charge from a gross misdemeanor to a felony. The district court accepted the stipulation, but explained that if appellant testified, the state could refer to the prior theft for impeachment purposes. The first trial ended in a mistrial the next day.

The second trial was held one week later before a different district court judge. Prior to trial, the district court granted the state's motion to allow four prior convictions as impeachment evidence. Defense counsel mentioned these prior convictions during his direct examination of appellant, and the jury was given cautionary instructions. Appellant was thereafter found guilty of card fraud under Minn. Stat. § 609.821, subds. 2(1), 3(a)(1)(iv) (2004).

At sentencing, defense counsel requested that appellant receive a gross misdemeanor sentence because no stipulation had been entered prior to the second trial and because no evidence had been given to the jury regarding appellant's prior theft conviction. The district court rejected appellant's arguments and sentenced appellant to 22 months imprisonment.

DECISION

1.

An appellate court is to limit its sufficiency-of-evidence review to whether the evidence, viewed in the light most favorable to the conviction, was sufficient to support a finding of guilt. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A jury's credibility determinations are given particular deference. *State v. Laine*, 715 N.W.2d 425, 431 (Minn. 2006).

To secure a conviction for financial transaction card fraud, the state was required to prove beyond a reasonable doubt that the credit card belonged to someone other than appellant, that appellant intentionally used the card, that the owner of the card did not consent, and that appellant knew the owner did not consent. See Minn. Stat. § 609.821, subd. 2(1) (2004).

Appellant argues that the state failed to prove that R.K. did not consent and that appellant knew he was using the card without consent, because the state attempted to prove these elements through circumstantial evidence. But the issue of consent was not proven circumstantially. Rather, the state provided R.K.'s direct testimony that he did not give his credit card to appellant and that he did not give appellant permission to use his card. On a record of conflicting versions of the events, a reviewing court must assume that the jury believed the witnesses whose testimony supports the verdict and disbelieves evidence to the contrary. See *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn.

2004); *State v. Voorhees*, 596 N.W.2d 241, 252 (Minn. 1999). The evidence was sufficient to support appellant's conviction.

2.

The district court imposed a felony sentence based on appellant's stipulation, before the first trial, that he had a prior theft offense. See Minn. Stat. § 609.821, subd. 3(a)(1)(iv). When the stipulation was concluded, defense counsel noted that appellant would "rather keep [the prior conviction] out of the jury's purview."

The stipulation was not mentioned by either party before or during the second trial, but the district court determined before trial that the theft conviction was among others that would be admissible to impeach appellant. At sentencing, defense counsel acknowledged that he "forgot to stipulate to the prior" conviction before the second trial and argued that appellant could only be sentenced to a gross misdemeanor because the jury "never contemplated an essential element of this offense." The district court rejected these arguments and ruled that the stipulation from the first trial "would carry over and be binding . . . unless revoked by the [d]efendant."

A defendant can stipulate to an element of an offense on the record or in writing. *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). Before allowing a stipulation, the district court must be satisfied that the defendant's agreement is knowing and voluntary. *Id.*

Appellant asserts that he made no "knowing and voluntary" stipulation because the circumstances changed between the first and second trial. In particular, appellant insists that there is good reason to believe that he would not have stipulated at the second

trial because of the district court's pretrial ruling that appellant's prior conviction would be admissible as impeachment evidence if he testified.

But even in the first trial, the district court specifically ruled that the prior conviction would be admissible as impeachment evidence if appellant testified. In addition, this type of a stipulation still benefits the defendant in appellant's situation by avoiding continuing emphasis on the prior conviction when the physical exhibit is introduced and when it is repeatedly mentioned and discussed during the state's case and closing arguments. *Cf. State v. Berkelman*, 355 N.W.2d 394, 397 n.2 (Minn. 1984) (stating that "[b]y judicially admitting the existence of the element of the prior conviction, the defendant removes that issue from the case"). Because it was to appellant's advantage to avoid submission of the prior conviction to the jury, any error in continuing the stipulation to the second trial was harmless; further evidence on the conviction would not have improved appellant's prospects for an acquittal. *See State v. Hinton*, 702 N.W.2d 278, 282 (Minn. App. 2005) (harmless error analysis applies to issues involving district court's rulings on stipulations to elements of offense), *review denied* (Minn. Oct. 26, 2005).

3.

Prior to the second trial, the district court granted the state's motion to admit impeachment evidence of appellant's prior convictions, which included two convictions for false information to police (January 2005 and April 2003); one conviction for felony theft (November 2004); and one conviction for felony possession of a firearm (July 1997). Appellant admits that the two false information convictions were admissible, but

asserts that the other two were far more prejudicial than probative. See Minn. R. Evid. 609(a) (providing that evidence of prior [felony convictions] not involving dishonesty is admissible after determination that “the probative value of admitting the evidence outweighs its prejudicial effect”); see *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978) (setting out factors to consider before admitting evidence of prior convictions not involving dishonesty).

But we need not decide whether the district court erred in admitting evidence of appellant’s theft and firearm-possession convictions, because any error was harmless. See *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996) (error is harmless beyond reasonable doubt if reviewing court concludes that verdict was “surely unattributable to the error”). A reading of the trial transcript shows that the convictions were mentioned in passing, along with the two admissible convictions tending to show dishonesty. The convictions were mentioned only once, by appellant himself, when he candidly acknowledged upon questioning by his attorney, that he had had “prior run-ins with the law.” The prosecutor did not question appellant about his prior convictions, nor did she refer to appellant’s prior convictions in her closing argument.

The jury’s verdict was more likely influenced by evidence that appellant had two prior convictions for giving false information to police, by the jury’s observation of appellant on the witness stand, and by appellant’s admissions that he attempted to use the card several times that night and the next day, and for amounts that did not necessarily coincide with the amount that he claimed R.K. told him was on the card. The verdict was

“surely unattributable” to any erroneous mention of appellant’s prior convictions for theft and possession of a firearm.

Affirmed.